Dato' Seri Anwar bin Ibrahim v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–323 OF 2009
ABU SAMAH, SULAIMAN DAUD AND AZHAR MA'AH JJCA
17 FEBRUARY 2010

Criminal Procedure — Charge — Application to strike out — Whether charge was mala fide, oppressive and abuse of process of court — Whether trial judge erred in law and fact in dismissing appellant's application to set aside and quash charge and prosecution against him — Whether on strength of medical report alone trial judge ought to have held charge baseless

Dato' Seri Anwar bin Ibrahim, the appellant, applied by way of notice of motion to set aside and quash the charge and criminal prosecution made against him in respect of an alleged act of sodomy, under s 377B of the Penal Code. The crux of the appellant's contention was that the charge and prosecution against him was made mala fide, oppressive and an abuse of the process of the court. The appellant relied on the medical report from the experts, wherein it was found that there was no conclusive clinical findings of penetration to the anus/rectum as would be the case if an alleged act of sodomy had been committed, to contend that the charge against him was mala fide, and that the charge was a ploy for political conspiracy, which was actuated by malice. The appellant thus urged the court to exercise its inherent power to stay or set aside and quash the charge made against him. The prosecution submitted that the case against the appellant was not based just on the medical report alone but on oral testimony, forensic evidence and other evidence. As such, it was the prosecution's submission that the charge against the appellant, which was based on the investigation by the police, was in accordance with the relevant laws. Although the prosecution conceded that the court had the inherent jurisdiction to stay or set aside and quash a charge, it argued that those powers could only be used in criminal law where there was a miscarriage of justice. After hearing the application, the trial judge found no merit in the appellant's contention and held that the medical report alone could not be used as a basis for the court to exercise its inherent power to set aside and quash the charge without the court hearing the oral testimony of witnesses. The trial judge therefore dismissed the appellant's application. This was the appellant's appeal against that decision. In this appeal, the appellant again argued that on the strength of the medical report alone the trial judge ought to have held that the charge against the appellant was baseless. The sole issue to be considered in this appeal was whether the trial judge had erred in law and in fact in dismissing

the appellant's application to set aside and quash the charge and prosecution against him

Held, dismissing the appeal:
The medical report by itself was not conclusive evidence and not the only evidence against the appellant. It was only corroborative in nature and the case for the prosecution would be based on the oral testimony of witnesses, forensic evidence and other evidence. Thus although the court had the inherent power to set aside and quash the charge and prosecution, in the circumstances of this case the appellant had not shown that the charge and the prosecution against him was mala fide, oppressive and an abuse of the process. As such the court could not invoke its inherent power to set aside and quash the charge and prosecution against the appellant (see paras 323 & 36).

[Bahasa Malaysia summary

Dato' Seri Anwar Ibrahim, perayu, melalui notis usul memohon untuk mengenepi dan membatalkan tuduhan dan pendakwaan jenayah yang dibuat terhadapnya berkaitan dengan tindakan meliwat yang didakwa di bawah s 377B Kanun Keseksaan. Pokok kepada hujah perayu adalah bahawa tuduhan dan pendakwaan terhadapnya dibuat secara mala fide, menindas dan merupakan penyalahgunaan prosiding mahkamah. Perayu bergantung kepada laporan perubatan dari para pakar; di mana didapati bahawa tiada sebarang penemuan klinik yang konklusif mengenai penembusan ke dalam dubur/rektum yang mana akan terjadi sekiranya tindakan meliwat yang didakwa telah dilakukan, untuk menegaskan bahawa tuduhan terhadapnya adalah mala fide dan bahawa tuduhan tersebut merupakan helah bagi komplot politik, yang mana didorong oleh niat jahat. Perayu dengan itu mendesak mahkamah untuk melaksanakan kuasa yang sedia ada untuk menggantung atau mengenepikan dan membatalkan tuduhan yang dibuat terhadapnya. Pendakwaan berhujah bahawa kes terhadap perayu bukanlah berdasarkan laporan perubatan sahaja tetapi juga keterangan lisan, keterangan forensik dan keterangan lain. Oleh itu, pendakwaan berhujah bahawa tuduhan terhadap perayu, yang mana berdasarkan penyiasatan oleh polis, adalah menurut undang-undang yang relevan. Walaupun pendakwaan mengaku bahawa mahkamah mempunyai bidang kuasa sedia ada untuk menggantung atau mengenepikan dan membatalkan suatu tuduhan, ia membantah bahawa kuasa tersebut hanya boleh digunakan dalam undang-undang jenayah di mana terdapat salah laksana keadilan. Selepas mendengar permohonan tersebut, hakim bicara mendapati tiada merit dalam hujah perayu dan memutuskan bahawa laporan perubatan sahaja tidak boleh digunakan sebagai asas untuk mahkamah melaksanakan kuasa sedia ada untuk mengenepi dan membatalkan tuduhan tanpa mahkamah mendengar keterangan lisan saksi-saksi. Hakim bicara oleh itu telah menolak permohonan oleh perayu. Ini merupakan rayuan perayu terhadap keputusan tersebut. Dalam rayuan ini, perayu sekali lagi mendakwa bahawa berdasarkan kekuatan laporan perubatan sahaja, hakim

bicara seharusnya memutuskan bahawa tuduhan terhadap perayu adalah tidak berasas. Isu utama untuk pertimbangan adalah sama ada hakim bicara telah khilaf dalam undang-undang dan fakta apabila menolak permohonan perayu untuk mengenepi dan membatalkan tuduhan dan pendakwaan terhadapnya.

Diputuskan, menolak rayuan:
Laporan perubatan tersebut dengan sendirinya bukanlah keterangan konklusif dan bukanlah satu-satunya keterangan terhadap perayu. Ia hanyalah bersifat menyokong dan kes pendakwaan adalah berdasarkan keterangan lisan, keterangan forensik dan keterangan lain. Oleh demikian, meskipun mahkamah mempunyai kuasa sedia ada untuk mengenepi dan membatalkan tuduhan dan pendakwaan, dalam keadaan kes ini, perayu tidak menunjukkan bahawa tuduhan dan pendakwaan terhadapnya adalah mala fide, menindas dan merupakan penyalahgunaan prosiding mahkamah. Oleh itu, mahkamah tidak dapat menggunakan kuasa sedia adanya untuk mengenepi dan membatalkan tuduhan dan pendakwaan terhadap perayu (lihat perenggan 33 & 36).]

Notes

For a case on application to strike out, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 1071.

Cases referred to

Attorney-General's Reference (No 2 of 2000), Re (2001) 1 Cr App R 36 (refd)
Connelly v Director of Public Prosecutions [1964] 2 All ER 401, HL (refd)
Datuk Haji Wasli bin Mohd Said v PP and another application [2006] 5 MLJ 172, HC (refd)
Director of Public Prosecutions v Humphrys [1976] 2 All ER 497, HL (refd)
EP Royappa v State of Tamil Nadu & Anor AIR 1974 SC 555 (refd)
Hui Chi-Ming v The Queen [1992] 1 AC 34, PC (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)
Metropolitan Bank, Ltd, and another v Pooley [1881–85] All ER Rep 949, HL (refd)
Mills v Cooper [1967] 2 All ER 100, QBD (refd)
PP v Ini Abong and other trials [2008] 8 MLJ 106, HC (refd)
PP v Lee Tin Bau [1985] 1 MLJ 388 (refd)
R v Crown Court at Norwith, ex p Belsham (1992) 94 Cr App R 382 (refd)
R v Great Yarmouth Magistrates, ex p Thomas, Davis and Darlington [1992] Crim LR 116 (refd)
Regina v Telford Justices, Ex parte Badhan [1991] 2 WLR 866, QBD (refd)
Regina v Chairman, County of London Quarter Sessions, Ex parte Downes [1954] 1 QB 1, DC (refd)
Regina v Horseferry Road Magistrates Court, Ex parte Bennett [1993] 4 CLJ 509, HL (refd)

Yeap Seok Pen v Government of the State of Kelantan [1986] 1 MLJ 449, PC (refd)

Legislation referred to

Criminal Procedure Code ss 178, 178(3), 179, 180, 181, 182, 183
Defence (General) Regulations 1939 [UK] reg 55AB
Iron and Steel Prices Order 1951 [UK]
Larceny Act 1916 [UK] s 23(1)
Penal Code s 377B
Police Act 1967
Prevention of Crime Act 1953 [UK] s 1(1)
Specific Relief Act 1950 s 54(e)

Appeal from: Criminal Application No 44–105 of 2009 (High Court, Kuala Lumpur)

Karpal Singh (Param Cumaraswamy, SN Nair and Wan Ahmad Shaddat with him) (SN Nair & Partners) for the appellant.
Mohd Yusof bin Zainal Abidin (Nordin Hassan, Wong Chiang Kiat, Norin Badaruddin and Faezah Azuna Latif with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abu Samah JCA:

[1] This is an appeal by the appellant, Dato' Seri Anwar bin Ibrahim against the decision of the learned judge of the High Court, Kuala Lumpur, who, on 1 December 2009 dismissed his application by way of a notice of motion to set aside and quash the charge and criminal prosecution against him under s 377B of the Penal Code and that he thereupon be discharged and acquitted accordingly. In the said notice of motion he also prayed that the criminal trial against him, vide MTJ3–45–9 of 2009 be stayed or adjourned pending the hearing of his application.

[2] The application was supported by an affidavit affirmed by the appellant himself in which he gave three main grounds for making the application, namely:

(a) the charge and prosecution against him was made mala fide, oppressive and an abuse of the process of the court;

(b) the charge was a ploy for political conspiracy and actuated by malice; and

(c) the charge was malicious as the medical report from the experts in respect of the alleged act of sodomy found that there was no conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient.

[3] The respondent ('the prosecution') refuted all the allegations. In its affidavit in reply affirmed by Mohamed Hanafiah bin Hj Zakaria, a deputy public prosecutor with the Attorney General's Chamber, the prosecution asserted that the charge against the appellant was based on the investigation by the police and in accordance with the relevant laws. It was further asserted that the evidence of the offence of sodomy against the appellant was not based on the medical report alone as the said medical report was only limited to physical examination and observation, which by itself, was not conclusive. The learned deputy prosecutor affirmed that the prosecution's case against the appellant would be based on oral testimony, forensic evidence and other evidence.

[4] Before the High Court, it was submitted on behalf of the appellant that the court has inherent power, and this was conceded by the prosecution, to stay or set aside and quash a charge which is mala fide, oppressive and an abusive of the process of the court. See *Metropolitan Bank, Ltd, and another v Pooley* [1881–85] All ER Rep 949; *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401; *Mills v Cooper* [1967] 2 All ER 100; *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497; *Regina v Horseferry Road Magistrates Court, Ex parte Bennett* [1993] 4 CLJ 509; *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; *Datuk Haji Wasli bin Mohd Said v Public Prosecutor and another application* [2006] 5 MLJ 172; *Public Prosecutor v Ini Abong and other trials* [2008] 8 MLJ 106.

[5] The prosecution nevertheless submitted, inter alia, that on the authority of the Supreme Court case in *Karpal Singh & Anor v Public Prosecutor*, in matters like criminal law of a purely domestic nature the court will only exercise its inherent power when there is miscarriage of justice. The prosecution also relied on s 54(e) of the Specific Relief Act 1950 which states that an injunction cannot be granted to stay proceedings in any criminal matter.

[6] The learned judge agreed that the court has inherent power to stay or set aside and quash the charge so as to prevent abuse of its process, but the exercise of such power depends on the facts of each case. He was, however, of the view that s 54(e) of the Specific Relief Act 1950, was not applicable as this was not an application for an injunction to stay a criminal proceedings.

[7] The learned judge, after hearing the application, perusing the medical reports and after having heard the parties, dismissed the appellant's application. He held, among others, that the medical report (exh DSAI–18) alone, could not be used as a basis for the court to exercise its inherent power to set aside and quash the charge without the court hearing oral testimony of witnesses. In arriving at his decision, the learned judge relied, inter alia, on:

(a) *Director of Public Prosecutions v Humphrys*, where it was held that a judge has no general power to quash the charge and to decline to allow the trial to proceed where an indictment has been preferred in accordance with the law;

(b) *Re Attorney-General's Reference (No 2 of 2000)* (2001) 1 Cr App R 36, where Kennedy LJ in delivering the judgment of the Court of Appeal held that:

> the trial judge simply did not have the power to prevent the prosecution from calling evidence on the basis that he thought a conviction was unlikely.

(c) *Archbold 2007: Criminal Pleading, Evidence and Practice*, where the learned authors at p 358, said:

> The jurisdiction to stay proceedings on the basis of abuse of process is to be exercised with greatest caution; the fact that a prosecution is ill advised or unwise is no basis for its exercise.

[8] The appellant, being dissatisfied, now appealed to this court.

[9] Before us, learned counsel for the appellant raised only one ground in support of the appellant's contention that the charge and prosecution against him was made mala fide, oppressive and an abuse of the process of the court. This sole ground is based on the medical report on the complainant by the Kuala Lumpur Hospital dated 13 July 2008 (exh DSAI–18). The medical report, under the heading, Summary/Conclusion, states as follows:

(a) No conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient.

(b) The presence of male DNA types from SWABS 'B5', 'B7', 'B8' and 'B9' are best interpreted with the identification of the sites of sampling.

[10] It was submitted that the word 'conclusive' means beyond reasonable doubt, in fact it was a certainty, higher than beyond reasonable doubt. The said medical report signed by three doctors, had clearly concluded that there was no conclusive clinical findings suggestive of penetration of the anus/rectum. The onus is on the prosecution to prove that there was penetration: see Ratanlal and Dhirajlal, *Law of Crimes*, (26th Ed) at p 2135 which states that the court must be satisfied that penetration took place and that the penetration, however little should be proved strictly.

[11] Learned counsel for the appellant had forcefully and eloquently argued that in the face of such finding by the Kuala Lumpur Hospital, how could the prosecution proceed with the trial; it was a clear cut case of abuse, prejudice and oppression. Trial was definitely unnecessary. On the strength of the medical report alone, the learned judge ought to have held that the charge was baseless. As the learned judge had completely misdirected himself after having held that it has inherent jurisdiction to stay or set aside and quash the charge, this court has a duty, a divine duty, to intercede to see that justice is done. It cannot, under the circumstances abdicate from its duty. It does not matter that trial had not proceeded or that some black hand is behind it.

[12] A number of cases were referred to us by learned counsel for the appellant for the proposition that the court has inherent power to set aside and quash a charge which is oppressive and an abuse of the process of the court. These cases include *Connelly v Director of Public Prosecutions*; *Director of Public Prosecutions v Humphrys*; *Public Prosecutor v Lee Tin Bau* [1985] 1 MLJ 388; *Karpal Singh & Anor v Public Prosecutor*; *Datuk Haji Wasli bin Mohd Said v Public Prosecutor and another application* and *Public Prosecutor v Ini Abong and other trials*.

[13] Learned solicitor general II, Datuk Mohd Yusof bin Hj Zainal Abidin, who was the lead counsel for the prosecution conceded that the court has inherent jurisdiction to set aside and quash a charge which is oppressive and an abuse of the process of the court but submitted that such power could only be exercised in limited circumstances: see *Regina v Chairman, County of London Quarter Sessions, Ex parte Downes* [1954] 1 QB 1, *Connelly v Director of Public Prosecutions*; *Director of Public Prosecutions v Humphrys*; *Karpal Singh & Anor v Public Prosecutor*.

[14] Now let us examine some of these cases. As early as 1881, Lord Blackburn in *Metropolitan Bank, Ltd, and another v Pooley* held that the court had inherently in its power the right to see that its process was not abused by a proceedings without reasonable grounds so as be vexatious and harassing. That was a civil case but Lord Devlin in *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 at p 483 was of the view that what Lord Blackburn said would also be applicable to criminal proceedings.

[15] In *Regina v Chairman, County of London Quarter Sessions; Ex parte Downes*, the defendants were indicted with offences under the Iron and Steel Prices Order 1951 and reg 55AB of the Defence (General) Regulations 1939. Before arraignment, counsel for the defendants moved to quash the indictments on the ground of insufficiency of evidence to support a conviction. The Chairman of the London Quarterly Sessions accepted the submission and quashed the indictments. The prosecutor moved for orders of mandamus and

certiorari. The Court of Appeal granted the orders of mandamus, holding that the Quarter Sessions had no power to quash the indictments because it was anticipated that the evidence would not support the charges.

[16] Lord Goddard CJ at p 6 said:

> Once an indictment is before the court the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or forms and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a nolle prosequi is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment disclosed an offence which a particular court has no jurisdiction to try.

Lord Goddard then went on to state:

> I know of no power in the court to quash an indictment because it is anticipated that the evidence will not support the charge.

[17] In *Connelly v Director of Public Prosecutions*, the appellant was indicted of two charges. In the first indictment, he was charged (with three others) with the murder of H. In the second indictment he was charged (together with three others) with robbery and with aggravation contrary to s 23(1) of the Larceny Act 1916. At the trial of the first charge for murder he raised a defence of alibi and alternatively he did not have the necessary intent to murder. All four accused were found guilty of murder. The trial judge then ordered the second charge not to be proceeded with without the leave of the court or the Court of Criminal Appeal. On appeal to the Court of Appeal, his conviction was set aside on the ground of misdirection on his alibi defence. The court then gave leave to proceed with the second charge.

[18] At the trial of the second charge before another judge, he gave the same defence as he had advanced at the first trial, viz, that he had not taken part in the armed robbery, and evidence given at the first trial was given again, including an admission that he committed robbery but denying murder. He was convicted of robbery with aggravation. He appealed against this conviction on the grounds among others, that the plea of autrefois acquit should succeed; that the crown were estopped from proceeding with the second charge because the issue whether he took part in the robbery had been decided in his favour by the Court of Criminal Appeal and that the trial judge had a discretion to stay the second charge. The Court of Appeal dismissed his appeal.

[19] Upon reference to the House of Lords, it was held that there was no abuse of process of the court in proceeding on the second indictment according to the practice prevailing at that time. Lord Reid held that the trial judge was entirely correct in declining to direct the prosecution not to proceed with the

trial of the second charge. Lord Morris of Borth-y-Gest, at p 408 was of the view that the trial judge, 'had no power to suppress the prosecution. There was no abuse of the process of the court. The indictment was correct in form. There was no basis for quashing it'.

[20] Lord Devlin in his judgment in that case generally agreed with Lord Goddard's proposition in *Regina v Chairman, County of London Quarter Sessions, Ex parte Downes* that once an indictment was before the court it must be tried except in four cases, namely, if it was defective, if the matter in bar was pleaded, if nolle prosequi was entered, and if the court has no jurisdiction. He however observed that it was wrong to treat it as if it were a comprehensive statement of the law for all purposes. He was of the view that, to the four exceptions given by Lord Goddard CJ there was a fifth exception, namely, 'a flagrant abuse of process' or 'a gross abuse of process' (at p 443). It is on this fifth exception that the appellant herein sought to set aside and quash the charge against him as being made mala fide oppressive and an abuse of the process of the court.

[21] The next case is *Director of Public Prosecutions v Humphrys*. In that case the respondent was charged of driving a motorcycle on 18 July 1972 while disqualified. He admitted driving while disqualified but denied that he was the person driving the motorcycle on that particular date. At the trial a police constable testified that he had stopped the respondent while he was driving. The respondent was however acquitted. Subsequent enquiries made by the police disclosed evidence that the respondent was in fact the driver who was stopped by the police constable. The respondent was subsequently charged with perjury in that during the course of his trial he had wilfully made a false statement, namely that he had not driven any motor vehicle in 1972. He was convicted of perjury. On appeal, the Court of Appeal quashed the respondent's conviction on the ground that the doctrine of issue estoppel applied to charges of perjury. The Crown appealed. The House of Lords held that the doctrine of issue estoppel has no application to criminal proceedings and in any event could not apply to prevent a charge of perjury against a person who had been acquitted of another offence in respect of evidence given by him at the trial for that offence. Accordingly the appeal was allowed and the respondent's conviction for perjury was restored.

[22] Viscount Dilhorne, in the course of his judgment had occasion to consider the extent of the power of the court in exercising its inherent power to quash an indictment. This is what His Lordship at p 509 said:

> Where an indictment has been properly preferred in accordance with the provisions of that Act, has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognise

> the existence of such a degree of omnipotence is, as my noble and learned friend, Lord Edmund Davies, has said, unacceptable in any country acknowledging the rule of law.

And at p 511, Viscount Dilhorne went on to say this:

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The function of the prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, than it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.
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> If there is any power... to stop a prosecution on indictment in limine it should only be exercised in the most exceptional circumstances.

[23] Lord Salmon agreed with Viscount Dilhorne. This is what His Lordship at p 527 said:

> I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecution; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy it ought not to have been brought. It is only if the prosecution amount to an abuse of the process of the court and is oppressive and vexatious that the judge has power to intervene.

[24] A more recent case is *Re Attorney-General's Reference (No 2 of 2000)*. In that case the defendant was charged with possession of an offensive weapon contrary to s 1(1) of the Prevention of Crime Act 1953. He pleaded not guilty to the offence. The judge expressed firm views on the merit of proceeding with the case and encourage the prosecution to offer no evidence. The prosecution declined to withdraw. As soon as the case had been opened and before any witnesses were called the judge invited the jury to find the defendant not guilty. The jury accepted the invitation and acquitted the defendant. The attorney general referred the case to the Court of Appeal on the following question of law:

> Whether in a prosecution which has otherwise been properly brought and where there is evidence to go before a jury, a trial judge has power to prevent the prosecution from calling evidence and direct the jury to acquit on the basis that he thinks a conviction is unlikely.

[25] The Court of Appeal held that the decision of the judge to stop the case was contrary to authority and improperly trespassed on the right of the Crown Prosecution Service to present its case in court. Kennedy LJ at p 4 said:

> The trial judge simply did not have the power to prevent the prosecution from calling evidence on the basis that he thought a conviction was unlikely.

[26] *Archbold 2010: Criminal Pleading Evidence & Practice* at paras 4–47 states as follows:

> Once an indictment is before the court the accused must be arraigned and tried unless: (a) on a motion to quash it is held defective in substance or form; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a nolle prosequi is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) the indictment discloses an offence which a particular court has no jurisdiction to try per Lord Goddard CJ in *Regina v Chairman, County of London Quarter Sessions, Ex parte Downes* [1954] 1 QB 1; (1954) 37 Cr App R 148 (See ante, §§ 1–190 et seq for consideration of legitimate objections to an indictment).
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> Where a prosecution is properly brought, a judge has no power to prevent the prosecution from presenting their evidence on the basis that he considers it unlikely there will be a conviction:*Re Attorney-General's Reference (No 2 of 2000)* (2001) 1 Cr App R 36 (CA) (and see *R v N Ltd*, Post, § 4–292).
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> The whole of the paragraph was approved in *R v Plant* (2008) 2 Cr App R 27 (CA) (at para 20).

[27] We have so far only referred to English cases but that does not mean that there is no local authority on this point. The most authoritative case is *Karpal Singh & Anor v Public Prosecutor*. In that case the applicants were charged in the magistrates' court in 1987 for offences under the Police Act 1967 based on a complaint made in 1984. The trials were delayed for a variety of reasons. The cases were finally fixed for hearing on 18 July 1989. At that hearing, the applicants raised a preliminary objection contending that the proceedings against them amounted to oppression and prejudice and that the court had a general and inherent power to protect its process from abuse and to strike out the proceedings. The magistrate rejected the contention. The High Court upon revision found no merit in the applicants' contention. Upon reference to the Supreme Court it was held that there was no provision in the Criminal Procedure Code for striking out proceedings or acquittal without hearing all the evidence the prosecution has to offer. The Supreme Court however held that the High Court may invoke such prerogative powers in rare instances where it is right to do justice to the accused.

[28] The Supreme Court at p 549 said:

> In matters like criminal law of purely a domestic nature our view is that the court will only exercise its inherent power when there is miscarriage of justice. The court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available ...

[29] A trial before the High Court is regulated by Chapter XX, consisting of ss 178 – 183 of the Criminal Procedure Code ('the Code'). Section 178(3) of the Code expressly provides that if the accused claims to be tried, 'the Court shall proceed to try the case'. The prosecution shall then open its case by stating shortly the nature of the offence charged and the evidence which it proposes to prove the guilt of the accused. Next, it shall examine its witnesses, who may in turn be cross-examined by the defence, and if necessary be re-examined (s 179). It is only after the prosecution closes its case that the court shall consider whether a prime facie case had been made out against the accused. If a prima facie case is not made out against the accused, the court shall acquit him accordingly. If a prima facie case is made out against him the court shall then call upon him to enter on his defence (s 180).

[30] En Sivarasa, learned counsel for the appellant had in his submission before the learned judge rightly conceded that there is no express provision in the Code for striking out and/or staying a charge. That was understandably the reason why the appellant sought to set aside or quash the charge and prosecution against him under the inherent powers of the court. The crux of the appellant's contention was that the charge and prosecution against him was made mala fide oppressive and an abuse of the process of the court.

[31] An abuse of process was defined in *Hui Chi-Ming v The Queen* [1992] 1 AC 34 (PC) at p 57 as 'something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding'. See also *Archbold 2010: Criminal Pleading Evidence & Procedure* at paras 4–54. The burden of establishing that the pursuit of particular proceedings would amount to an abuse of process is on the accused and the standard of proof is on the balance of probabilities: *Regina v Telford Justices, Ex parte Badhan* [1991] 2 WLR 866; *R v Crown Court at Norwith, ex p Belsham* (1992) 94 Cr App R 382 (DC).

[32] Now, in view of what had been submitted before us did the learned judge err or misdirected himself in law and in fact in dismissing the appellant's application to set aside and quash the charge and prosecution against him as being mala fide, oppressive and an abuse of the process of the court, based solely on the medical report by the Kuala Lumpur Hospital (exh DSAI–18)?

[33] We have carefully considered this appeal at great length. We are of the view that the authorities referred to us are against the appellant. We agree with the submission by learned solicitor general II that the medical report by itself is not conclusive evidence and the only evidence against the appellant. It is only corroborative in nature. The main evidence will be from the complainant himself. The learned deputy public prosecutor who affirmed the affidavit in reply to the appellant's affidavit had clearly stated that the case for the

prosecution would be based on oral testimony of witnesses, forensic evidence and other evidence. It was not solely based on the said medical report.

[34] In *R v Great Yarmouth Magistrates, ex p Thomas, Davis and Darlington* [1992] Crim LR 116 it was held that the burden imposed on the party alleging mala fide is a heavy one. Bhagwati J (with Chandrachud and Krishna Iyer JJ) in *EP Royappa v State of Tamil Nadu & Anor* AIR 1974 SC 555 at p 586 held the same view:

> ... The burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved and the very seriousness of such allegations demands proof of a high order of credibility.

[35] In *Yeap Seok Pen v Government of the State of Kelantan* [1986] 1 MLJ 449 at p 453, the Privy Council held that, 'He who asserts bad faith has the burden of proving it, mere suspicion is not enough'. In that case the Privy Council held that the burden of establishing bad faith was at least on a prime facie case.

[36] In the circumstances of this case, we are of the view that the appellant had not shown that the charge and the prosecution against him was mala fide, oppressive and an abuse of the process of the court. It is insufficient and it is not justified for the court to exercise its inherent power to set aside and quash the charge and prosecution against the appellant on the ground that it was mala fide, oppressive and an abuse of the process of the court purely on the basis of the medical report, which is merely corroborative in nature.

[37] For the above reasons, the appeal by the appellant is hereby dismissed.

Appeal dismissed.

Reported by Kohila Nesan